No. 21167

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PERLEY M. LEWIS, ET UX., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

EDWIN L. WEISL, JR.,
Assistant Attorney General.

WILLIAM M. COPPLE,
United States Attorney,
Phoenix, Arizona 85025.

RICHARD S. ALLEMAN,
Assistant United States Attorney,
Phoenix, Arizona 85025.

ROGER P. MARQUIS,
JOHN G. GILL, JR.,
Attorneys, Department of Justice,
Washington, D. C. 20530.

I N D E X

CITATIONS

Regulations:

Miscellaneous:

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OPINION BELOW

The unreported opinion and order of the district court are set forth at pages 193-196 of the record.

JURISDICTION

This case was instituted under the alleged jurisdiction of the Administrative Procedure Act, 5 U.S.C. sec. 1009, and 28 U.S.C. sec. 1361, as amended, Act of October 5, 1962, 76 Stat. 744, against local officials of the Department of the

Interior (R. 1). Appellants sought judgment declaring that the decisions were null and void and directing the appellees to issue to the appellants a cash certificate and a fee patent to the described land. Appellees deny the jurisdiction of the district court to grant any of the relief sought.

Summary judgment adverse to appellants was entered by the district court on March 23, 1966 (R. 193-196). Timely notice of appeal was filed on May 19, 1966 (R. 217). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether this Court's decision in Ferry v. Udall governs the issues in this case.

2. Whether appellants make any showing that Ferry v. Udall is wrong.

STATUTES AND REGULATIONS INVOLVED

Section 2455, Revised Statutes, as amended, 43 U.S.C. sec. 1171, Section 14 of the Taylor Grazing Act, referred to herein as the Isolated Tract Act, provides:

> Notwithstanding the provisions of section 678 of this title and of sections 212, 321, 662, and 945 of this title, it shall be lawful for the Secretary of the

> Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: Provided, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: * * *.

Section 2478, Revised Statutes, as amended, 43 U.S.C. sec. 1201, authorizing the Secretary of the Interior to issue appropriate regulations, provides:

> The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

48 Stat. 1272, Section 7 of the Taylor Grazing Act, 43 U.S.C. sec. 315f, reads:

> The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * *.

Among the regulations of the Secretary of the Interior applicable to the present cases is 43 C.F.R. (1954 ed.) sec. 250.5, which provides:

> The filing of an application in conformity with the regulations in this part will not segregate the land applied for from other application under the public land laws, or defeat a prior valid right initiated under any such law. However,

> until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights against the United States, and no action taken will create any contractual or other obligation of the United States. 1/

Further applicable regulations are 43 C.F.R. secs. 250.11(a), 250.11(f) and 250.12(c), which state:

> (a) When all persons present shall have ceased bidding, the Manager will, in the usual manner, declare the bidding closed, subject to the preference right of purchasers or owners on contiguous land * * *

1/ As a result of rearrangement and redesignation in 28 Fed. Reg. 1589, Feb. 20, 1963, 29 Fed. Reg. 4302, March, 1964, and Circ. 2151, 29 Fed. Reg. 10464, July 28, 1964, this regulation is now cited as 43 C.F.R. secs. 2243.1-5.

Though the language and organization of the rule have been changed, today's regulation is essentially the same as 43 C.F.R. sec. 250.5 which was applicable throughout the entire administrative proceedings in this case. It is obvious that the new regulation would have produced the same result. The pertinent part of the new regulation reads

> (b) The acceptance of an offer to purchase (bid) will be made by the issuance of a final certificate to the bidder. Until the final certificate is issued the right is preserved to the authorized officer at any time to determine that the sale should not be held, that the lands should not be sold, or that any and all bids should be rejected. * * *

Throughout this brief the former designation [43 C.F.R. sec. 250.5] will be used as this designation is used by appellants and was in effect at the time these legal issues arose.

> announce the amount of the highest bid and declare the offeror thereof . . . the highest bidder, provided that the buyer immediately pays to the Manager the amount of the bid, if he has not already done so * * *.
>
> (f) If, by the end of the preference right period, no preference right has been asserted, the sale will be declared closed and the Manager may declare the highest bidder the purchaser.
>
> (c) When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser.

STATEMENT

On April 25, 1956, an application for the sale of 160.62 acres of land (the property involved in this appeal) was filed in the Phoenix, Arizona, Land Office, Bureau of Land Management, United States Department of the Interior, by Mary T. Rexroat, for the purchase of an isolated tract of public domain land at public auction in conformity with Section 14 of the Taylor Grazing Act, 43 U.S.C. sec. 1171 (R. 3). Thereafter, the land was classified for public sale at a minimum price of $8,031 (the figure thought to represent the appraised value of the land on July 17, 1959), and auction of the land was held pursuant to the provisions of 43 U.S.C. sec. 1171 and in accordance with 43 C.F.R. sec. 250. On November 3, 1959, said

Mary T. Rexroat was declared the high bidder, offering $9,150; however, appellants and three other adjoining landowners filed preference claims in accordance with the statute (R. 4,5). On December 4, 1959, the Land Office Manager declared these preference right claimants qualified, each having paid the full bid price of $9,150. They were given 30 days within which to divide the land. Such an agreement was filed with the Land Office on January 25, 1960 (R. 6).

On June 6, 1960, the Acting Manager of the Land Office vacated the decisions of December 4, 1959, because the subject sale was not in accord with the Department's anti-speculation policy (R. 99). The appellants and Mary E. Ford, another preference right claimant, prosecuted timely appeals to the Director, Bureau of Land Management. The remaining preference right claimants did not appeal and their rights have been closed out by the Department of the Interior.

On October 11, 1960, the Acting Director, Bureau of Land Management, issued a decision affirming the action taken by the Acting Manager. Perley M. and Mildred C. Lewis and Mary E. Ford, Arizona, 023951, 023990 (R. 106-110). He noted that this land came within the Department's anti-speculation policy and emphasized the retrospective application of this

policy and appellants' complete lack of any legal or equitable rights in the land involved. From this affirmance Mary E. Ford did not appeal.

Thereafter, appellants, the only remaining preference right claimants, appealed to the Secretary of the Interior. Pending this appeal, the Bureau of Land Management again appraised the property in order more accurately to determine the value as of November 3, 1959 (the date of the original high bid). This appraisal indicated the 1959 value to be $30,500, or $190 per acre, and not $8,031 as originally reported. On December 30, 1963, the Assistant Secretary of the Interior affirmed the decisions below. Perley M. Lewis and Mildred C. Lewis, A-28707 (R. 187-189). The Assistant Secretary pointed out that the anti-speculation policy had been superseded and broadened by the land conservation policy which dictated an identical result. It required that no transaction be consummated, in the absence of a binding contract, where the Government would not receive a full return for the sale of public land.

On April 6, 1964, a check in the sum of $9,150 was issued to the appellants. On April 10, 1964, it was returned to the Manager of the Phoenix Land Office with a letter stating appellants' intention to seek judicial review. The $9,150 has been

placed in a suspense account and is available to the appellants at their request.

In the district court proceeding, the defendants-appellees' motion for summary judgment was granted and the plaintiffs-appellants' motion for summary judgment was denied. The court held that the Secretary had the discretion to accept or reject the offer of the plaintiffs-appellants up to the time a cash certificate was actually issued. It pointed out that the local land office sale was an auction with reserve, as was held in Ferry v. Udall, 336 F.2d 706, 710 (C.A. 9, 1964), cert. den., 381 U.S. 904, and Willcoxon v. United States, 313 F.2d 884 (C.A. D.C. 1963), cert. den., 373 U.S. 932. The court refrained from ruling upon the plaintiff's contentions as to the necessity of an evidentiary hearing or publication of departmental policies in the Federal Register and did not reach the question of whether the Administrative Procedure Act required judicial review of the exercise of agency discretion herein involved. However, the court did further rule that there was no conflict between Sections 7 and 14 of the Taylor Grazing Act (R. 193-196).

SUMMARY OF ARGUMENT

1. The facts and the applicable statutes and administrative regulations involved in this case are almost identical to those in the case of Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964), cert. den., 381 U.S. 904. The substance of this appeal may be disposed of by a reading of that opinion. Appellants' attempts to distinguish this precedent fail as they do not point to a single fact or transaction that could change the legal significance of those in Ferry.

2. Appellants fail to show that the Ferry decision is wrong. That case flatly held that no rights vest until the issuance of a cash certificate. Further, no rights are derived by reference to Section 7 of the Taylor Grazing Act because that Act clearly has to do with homesteading, and has no applicability to the sale of isolated tracts at public auction. Finally, the fact that appellants never attained any legal or equitable rights in the property involved herein makes their remaining arguments irrelevant and without merit.

ARGUMENT

I

THIS COURT'S DECISION IN FERRY v. UDALL IS DISPOSITIVE OF THE ISSUES IN THIS CASE

At the outset it must be noted that this Court's decision in Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964), cert. den., 381 U.S. 904, constitutes a veritable brief in opposition to appellants' points. Appellants recognize this at page 18 of their brief, where they acknowledge that in alleging any rights under the statutes involved they must "face head on" not only Ferry v. Udall, supra, but also Willcoxon v. United States, 313 F.2d 884 (C.A. D.C. 1963), cert. den., 373 U.S. 932.

The Ferry opinion was occasioned by two factual situations[2/] that were almost identical to the situation in this case. Since it is appellees' position that Ferry is controlling here, we ask the Court to note the similarity of facts (336 F.2d 708, 709):

> A summary judgment for defendants was entered in each case and on identical grounds. Because of the similarity in the facts involved and the identity of issues raised, the two cases were consolidated for the purposes of this appeal.

2/ The Ferry v. Udall and Freeman v. Udall cases were consolidated for appeal.

The essential facts in both cases are undisputed. The Secretary invited bidding on certain isolated tracts of public lands exposed for sale pursuant to authority vested in him under the Isolated Tracts Act, Rev. Stat. §2455, as amended, 43 U.S.C. §1171 (1958). Freeman and Ferry submitted bids on the particular tracts involved in their respective cases. In both cases they were declared by the Land Manager to be high bidder, paid the bid price, and received receipts therefor.

In prolonged proceedings which followed in the Freeman case, the Manager's decision that Freeman was the preferred bidder was affirmed by the Secretary, through his Solicitor, who, in his decision, declared Freeman "purchaser" of the land. After prolonged proceedings in the Ferry case, the Assistant Secretary of Interior resolved, in Ferry's favor, a challenge that the bidding was unethical, but remanded the case to the Land Manager for further consideration.

In each case, before the cash certificate was issued, the Secretary determined that the appraisal value of the lands in question had been understated and that the true value of the land at the time the bids were received was several times higher than the bid price. On the basis of this, the Secretary entered orders vacating the sales. Freeman and Ferry then instituted the actions involved in this appeal. (Footnotes omitted.)

Briefly stated, this Court held on the above facts that (1) no rights accrued to the appellants prior to the issuance of a cash certificate (p. 709), (2) the proceedings up to the issuance of the cash certificate constituted an auction with reserve (p. 710), (3) the Secretary's activities under the Isolated Tract Act are discretionary (p. 710), (4) the Secretary had discretion to refuse to sell for whatever reason he found adequate (p. 711), (5) the Secretary's refusal to issue cash certificates is not subject to judicial review (p. 711), and (6) the situation at hand is distinguishable from the many types of cases having some mandatory element in the controlling statutes (pp. 712, 713).

These points of law counter the substance of appellants' arguments. Appellants, however, attempt to distinguish the Ferry decision from the case at hand on four points (Br. 18-19).

First, they contend that here there exists a situation where the Local Land Office based its refusal to issue a cash certificate on a ground different from that of inadequate price, which was used by the Secretary in affirming such refusal (Br. 18). This is not true and is no distinction. Concededly, the original refusal was based on the Department of the Interior's anti-speculation policy and the second on its

land conservation policy. But the different names given the policies were merely due to the change in Administrations. Both refusals were based on inadequacy of price. The initial decision of June 6, 1960, found that (R. 99):

> (b) the land is within the influence of expanding cities or towns where the land uses are changing to more intensive uses.

Secretary Seaton's anti-speculation policy had its raison d'etre in inadequacy of price. Note that this policy (issued February 5, 1960) was occasioned by hearings held two weeks previous (January 21, 22, 23, 1960) in the Phoenix, Arizona, area by the Special Subcommittee of the Committee on Government Operations of the House of Representatives. The purpose of these hearings was stated as follows:

> [T]o gather facts from which we may determine the validity of complaints received by the committee that public land of the United States is being disposed of by the Department of the Interior, through exchanges and sales, at prices based upon faulty and deficient appraisals, representing in many cases only a small fraction of the true value of the land.

Hearings, H. Subcommittee of the Committee on Government Operations, "Land Appraisal Practices," 86th Cong., 2d sess. (1960)

p. 1. Moreover, if the final decision were based on solid ground, it would be of no moment here that the earlier was on some other ground.

Secondly, appellants attempt to distinguish Ferry by saying in Ferry the fact that the original appraisal was a mistake was not at issue (Br. 18). This contention does not serve to distinguish Ferry. Whether or not the original appraisal in that case was at issue becomes irrelevant in the light of the Court's language at page 711 in talking about an attempt to distinguish the Willcoxon case.

> * * * the Secretary, in his discretion, may refuse to sell for whatever reason he finds adequate.

Appellants' third and fourth attempts to distinguish Ferry boil down to saying that reappraisal of the property took 4½ years and the anti-speculation policy discriminated against appellants (Br. 19). It is true that an exact figure as to the true 1959 value of the land in question was not handed down until 1963, but just as in Ferry and Freeman the property was in essence declared to be undervalued by the initial refusal to issue a cash certificate (in this case on June 6, 1960) (R. 99).

Likewise, the anti-speculation policy, if it can be said to have discriminated, worked more to the detriment of Ferry and Freeman, who had much larger sums to reap, had they succeeded in obtaining cash certificates (336 F.2d 708, 709, footnotes 2 and 3).

Appellants' only variation from Ferry is their unique theory that they acquired vested rights under Section 7 of the Taylor Grazing Act by virtue of their application to buy public land (Br. 19, 20). That point was correctly not urged in Ferry and Willcoxson because, as we shall show, it plainly lacks merit.

II

APPELLANTS MAKE NO SHOWING
THAT FERRY IS WRONG

A. No rights vest under the Isolated Tracts Act before issuance of the cash certificate. - Ferry and Willcoxson spell out why the Secretary of the Interior is clearly correct in so holding. We will not burden the Court with a repetition of the reasoning of those cases. Appellants fail, we feel, to show any error therein. In this connection, the Court should be advised that the further question, whether rights vest after issuance of the cash certificate and before patent, is presently involved in other litigation, and nothing in this brief should be interpreted as an apparent concession by the appellees that upon issuance of a cash certificate rights do vest.

B. Appellants derive no rights from Section 7 of the Taylor Grazing Act or the Secretary's regulations. - Section 14

of the Taylor Grazing Act (Isolated Tracts) in now way depends upon Section 7 (involving homestead classification). The Isolated Tracts Act contemplates the disposal of public land at auction. The authorization for such sales originally derives from Section 5 of the Act of August 3, 1846. It enabled the Commissioner of the Land Office to order into market "isolated or disconnected tracts or parcels of unoffered lands, which in his judgment it would be proper to expose for sale * * *." This Section was designed to dispose of lands, which by virtue of their isolation would not be useful in other ways. Section 5 was unique and an entity unto itself. It did not depend on the homestead policy or any other policy; rather, it served to remove from the public domain land, which, although valuable, was not compatible with other land programs.

The situation has not changed today. Though the present statute enlarges the scope of the Section, [3/] it is

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3/ The Act of July 30, 1947, increased the size of the isolated tract or parcel allowed sold at public auction from 760 acres to 1,520 and substituted 760 acres for the former 160-acre limit with regard to the sale of mountainous tracts.

evident the same purpose inheres, Section 14 (43 U.S.C. sec. 1171) reads in pertinent part:

> [I]t shall be lawful for the Secretary of the Interior to order into market and sell at public auction, * * * any isolated or disconnected tract * * *. (Emphasis added.)

Appellants seek to derive some comfort from Section 7 of the Taylor Grazing Act, 43 U.S.C. sec. 315(f) (Br. 19-22). Their contentions in this regard, however, are not applicable, since Section 7 deals exclusively with homesteading. A reading of this Section shows it has nothing to do with competitive auction sales (43 U.S.C. sec. 315(f)):

> The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands * * * which are more valuable or suitable for the production of agricultural crops * * * and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. * * * [Emphasis added.]

It is obvious that the above language is geared to classification and not disposal. Moreover, the history of "homestead entry" demonstrates that it is a method of acquiring public land at little or no cost at all. Such acquisition

has usually carried with it the obligation of living upon the land and improving it. This is quite a different thing from an auction sale in the market, as required by Section 14.

A reading of the Secretary's current homestead regulations (43 C.F.R., subpart 2211) which implement Section 7 of the Taylor Grazing Act, demonstrates the separate operation of Section 7 from Section 14. These regulations provide for the payment of only nominal fees by the applicant-entryman, 4/ while they set up strict standards and obligations with which the homesteader must comply. 5/ In fact, it was just the compliance with such burdensome homestead requirements to which many of appellants' authorities refer. 6/ It

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4/ 43 C.F.R. sec. 2211.1-3.

5/ Sec. 2211.0-6 (qualifications and disqualifications.)
Sec. 2211.2-1 (habitable house)
Sec. 2211.2-3 (cultivation)
Sec. 2211.2-5 (cancellation for non-compliance)

6/ Frisbie v. Whitney, 76 U.S. (9 Wall.) 187 (1869). (Br. 30);
Lyttle v. Arkansas, 50 U.S. (9 How.) 314 (1850) (Br. 30, 37);
United States v. Fitzgerald, 40 U.S. (15 Pet.) 407 (1841) (Br. 30);
The Yosemite Valley Case, 82 U.S. 77 (1872) (Br. 29);
Danials v. Wagner, 237 U.S. 547, (1914) (Br. 35) (substitution of land under Forest Act of 1897).

is the broad distinction between the homestead process and public auction which makes these authorities inapplicable and defeats the argument that Section 7 has given appellants an "inceptive or inchoative right" (Br. 27).

Finally, the legislative history of Section 14 leaves no doubt as to the independence of the Isolated Tracts Act from the homestead laws. S. Rept. No.547, Senate Committee on Public Lands, July 15, 1947, U.S. Cong. Code Service p. 1510, reads in part:

> There are tracts of public lands over 760 acres in many areas of the country which are effectively isolated from other public lands. There is no good reason why the government should retain ownership over them The Interior Department advises us there is no use holding them for homesteaders, because if they had been suitable they would have been homesteaded years ago, and being isolated they are not so situated that they can be included in a land program.

Appellants also point to the Secretary's regulations, 43 C.F.R. secs. 250.11 and 250.12, as being declarative of rights derived by appellants by virtue of their high bid and compliance with application procedures (Br. 22). The simple answer to this is that appellants ignore the provisions of

43 C.F.R. sec. 250.5 that "no action taken will create any contractual or other obligation of the United States until the issuance of a cash certificate." 7/

C. Appellants' other Arguments are irrelevant and without merit. - Appellants make three further contentions: (1) that the Secretary's action in this case is reviewable under the Administrative Procedure Act, (2) that the Interior Department's anti-speculation and land conservation policies constituted a bill of pains and penalties, and (3) that these policies should have been in the form of regulations and should have been published in the Federal Register. 8/

7/ This argument was presented in Ferry. The Court met the issue squarely (336 F.2d 711):

> The second argument along this line is that the offers of the appellants were accepted when they were declared to be "high bidder" and "purchaser." The significance of this, they argue, is that 43 C.F.R. §250.5 is directed only to "applicants" and "bidders" and, by being designated "purchasers," they were put in a category of persons to whom the regulations do not apply. The argument overlooks the fact that 43 C.F.R. §250.5 expressly states that bids are accepted only by the issuance of the cash certificate and that no other action "taken will create any contractual or other obligation of the United States."

8/ This complaint of appellants is not put forth directly. Rather in a number of places in their briefs (p. 7, 9, 10, 31, 33), it is used cumulatively to butress the general allegation that the Secretary acted outside the law.

These items become irrelevant when it is shown, as has been done above and in the Ferry and Willcoxon opinions, that appellants never acquired any rights of which they could be deprived. Despite this, the contentions have other failings.

First, the Isolated Tracts Act comes under the exception to Section 10 of the Administrative Procedure Act, which precludes from judicial review agency action by law committed to agency discretion. So this Court squarely held on page 711 of the Ferry decision. We need not add to the list of cogent support that the Court provides in its opinion.

Secondly, the facts of this case in no way fit the definition of a bill of attainder, 9/ to wit, legislative acts that apply to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. Garner v. Los Angeles Board, 341 U.S. 716, 772 (1951); United States v. Lovett, 328 U.S. 303, 315 (1946).

Finally, if any question be raised as to the necessity for more regulations and publication in the Federal Registe

9/ A bill of pains and penalties is a bill of attainder imposing a punishment less than death. Such bills are within the constitutional prohibitions against bills of attainder. Drehman v. Stifle, 8 Wall. 595, 601 (1869).

when the anti-speculation and land conservation policies were announced, it is answered simply by noting that these policies are too general to lend themselves to specific regulations, that they could be implemented by already-existing regulations (as they were in this case by 43 C.F.R. sec. 250.5), and that they amounted to nothing more than an assertion that the public interest would be protected. Furthermore, appellants do not complain of lack of notice, and Section 3 of the Administrative Procedure Act, 5 U.S.C. sec. 1002, does not contemplate the publication in the Federal Register of such a broad and generalized policy. In any event, it is hard to see how the lack of publication in the Federal Register conferred any rights on appellants to the land they claim.

CONCLUSION

For the forgoing reasons we submit the judgment of the district court should be affirmed.

Respectfully,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

WILLIAM M. COPPLE,
United States Attorney,
Phoenix, Arizona, 85025.

RICHARD S. ALLEMAN,
Assistant United States Attorney,
Phoenix, Arizona, 85025.

ROGER P. MARQUIS,
JOHN G. GILL, JR.,
Attorneys, Department of Justice,
Washington, D. C., 20530.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN G. GILL, JR.
Attorney, Department of Justice
Washington, D. C., 20530.